Nandakumar a/l Govindasamy v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO K–05–45 OF 1997
SHAIK DAUD, ABU MANSOR AND HAIDAR JJCA
12 JANUARY 1999

Criminal Procedure *— Jury — Amendment of charge — Accused originally charged with murder before judge and jury — Charge amended to one of culpable homicide not amounting to murder — Jury discharged and case heard by judge alone — Whether judge ought to have proceeded with the trial in the presence of the jury in spite of amendment to charge*

The appellant was originally jointly charged with three others for the offence of murder under s 302 of the Penal Code. He and the three others pleaded not guilty and the trial commenced before a panel of jury on 8 June 1996. After the tenth witness had testified, the prosecution tendered an amended charge for an offence of culpable homicide not amounting to murder under the first limb of s 304 of the Penal Code. The three co-accused pleaded guilty to the amended charge and they were accordingly sentenced. The appellant however claimed to be tried. The learned judge thereupon discharged the jury and proceeded with the rest of the trial in a summary way. At the conclusion of the trial the appellant was convicted on the amended charge and sentenced to 15 years' imprisonment from the date of his arrest. The appellant appealed to the Court of Appeal against both conviction and sentence. On appeal, counsel for the appellant submitted that the learned judge had erred in law when pursuant to the amendment of the charge he discharged the jury and proceeded with the rest of the hearing in a summary way. Counsel contended that the judge ought to have proceeded with the trial in the presence of the jury in spite of the amendment to the charge.

Held, dismissing the appeal on conviction but allowing the appeal on sentence:

In the circumstances of the present appeal and in the light of the (then) Supreme Court decision in *Yau Heng Fang v PP* [1985] 2 MLJ 335, the learned judge properly discharged the jury when the murder charge was amended to one of culpable homicide not amounting to murder and in proceeding with the trial without jury. In the circumstances, the trial was not a nullity. After hearing submissions on sentence, the sentence imposed on the appellant should be reduced to 12 years effective from the date of his arrest (see p 617C–D); *Khalid Panjang & Ors v PP* [1964] MLJ 67 not followed and *Yau Heng Fang v PP* [1985] 2 MLJ 335 followed.

[Bahasa Malaysia summary

Perayu pada asalnya dipertuduhkan bersama dengan tiga orang yang lain untuk kesalahan membunuh di bawah s 302 Kanun Keseksaan.

Beliau dan tiga orang tersebut telah mengaku tidak salah dan perbicaraan bermula di hadapan satu panel juri pada 8 Jun 1996. Selepas keterangan daripada saksi yang kesepuluh, pihak pendakwaan telah mengemukakan pertuduhan terpinda untuk satu kesalahan homisid salah tidak terjumlah kepada pembunuhan di bawah bahagian pertama s 304 Kanun Keseksaan. Tiga orang tertuduh bersama tersebut mengaku salah kepada pertuduhan terpinda dan mereka dihukum seperti yang sepatutnya. Namun demikian, perayu menuntut dibicarakan. Hakim yang arif kemudiannya melepaskan juri dan meneruskan perbicaraan secara terus. Di penghujung perbicaraan perayu disabitkan atas pertuduhan terpinda dan dijatuhkan hukuman penjara selama 15 tahun dari tarikh tangkapannya. Perayu merayu kepada Mahkamah Rayuan terhadap kedua-dua sabitan dan hukuman. Atas rayuan, peguam perayu berhujah bahawa hakim yang arif telah terkhilaf dari segi undang-undang ketika beliau melepaskan juri dan meneruskan pembicaraan secara terus berikutan pemindaan pertuduhan. Peguam menghujahkan bahawa hakim seharusnya meneruskan perbicaraan dalam kehadiran juri meskipun pertuduhan dipinda.

Diputuskan, menolak rayuan atas sabitan tetapi membenarkan rayuan atas hukuman:

Dalam keadaan rayuan ini dan memandangkan keputusan Mahkamah Agung (pada ketika itu) dalam *Yau Heng Fang v PP* [1985] 2 MLJ 335, hakim yang arif telah melepaskan juri dengan wajarnya apabila pertuduhan pembunuhan dipinda kepada pertuduhan homisid salah yang tidak terjumlah kepada pembunuhan dan dalam meneruskan perbicaraan tanpa juri. Dalam keadaan sedemikian, perbicaraan ini bukanlah satu pembatalan. Selepas mendengar penghujahan, hukuman yang dikenakan ke atas perayu haruslah dikurangkan kepada 12 tahun mulai daripada tarikh tangkapannya (lihat ms 617C–D); *Khalid Panjang & Ors v PP* [1964] MLJ 67 tidak diikut dan *Yau Heng Fang v PP* [1985] 2 MLJ 335 diikut.]

Notes

For cases on trial by jury, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1616–1644.

Cases referred to

Khalid Panjang & Ors v PP [1964] MLJ 67 (not folld)
Yau Heng Fang v PP [1985] 2 MLJ 335 (folld)

Legislation referred to

Penal Code (FMS Cap 45) ss 200(ii), 302, 304

A *Karpal Singh* (*Karpal Singh & Co*) for the appellant.

Zauyah Be bte Loh Khan (Attorney General's Chambers) for the respondent.

Shaik Daud JCA (delivering the judgment of the court): The appellant was originally jointly charged with three others for the offence of murder under
B s 302 of the Penal Code (FMS Cap 45), in the High Court at Alor Setar. He and three others pleaded not guilty and the trial commenced before a panel of jury on 8 June 1996. After the tenth witness had testified, the prosecution tendered an amended charge for an offence of culpable homicide not amounting to murder under the first limb of s 304 of the Penal
C Code. The amended charge was read and explained to the appellant and his three co-accused. The three co-accused pleaded guilty to the amended charge and they were accordingly sentenced. The appellant, however, claimed to be tried. Thereupon the learned judge discharged the jury and proceeded with the rest of the trial in a summary way. In view of the amended charge, the learned judge asked learned counsel representing the
D appellant whether he desired to recall any of the witness already called and the reply was in the negative. At the continued hearing, two of the co-accused became crown witnesses. At the conclusion of the trial, the appellant was convicted on the amended charge and sentenced to 15 years' imprisonment from the date of his arrests The facts leading to the conviction of the appellant are not relevant for the purpose of the present
E appeal which is an appeal on a pure point of law.

Mr Karpal Singh for the appellant submitted that the learned judge erred in law when pursuant to the amendment of the charge, he discharged the jury and proceeded with the rest of the hearing in a summary way. He contended that the learned judge ought to have proceeded with the trial in
F the presence of the jury in spite of the amendment to the charge. He argued that the finding of facts up to the tenth witness had to be decided by the jury as judges of facts and this function cannot be usurped by the learned judge. He referred us to a 1964 Federal Court decision of *Khalid Panjang & Ors v PP* [1964] MLJ 67, and contended that the principle therein ought to apply in the present case. In *Khalid Panjang*'s case the then Federal Court held as
G follows:

> At some stage prior to the commencement of a trial in the High Court, the question of the mode of trial must be decided, ie whether it is to be by jury or by a judge alone. The criterion, contained in s 200 of the Criminal Procedure Code is that 'in all cases where the punishment of death is authorized by law
H the accused shall be tried by jury'. The only practicable time at which the criterion is to be applied is the commencement of the trial.
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> Once a trial has been commenced before a jury, it can only be terminated, apart from questions of irregularity and so forth, by a verdict of the jury which must be either that the accused person is guilty or not guilty of either the offence with which he was originally charged or any other offences for which
I he could be convicted on the original charge by reason of the provisions of the Code as a whole.

Based on the above, Mr Karpal Singh contended that on the facts of the present case, in spite of the amendment of the charge, the learned judge ought to have proceeded with the hearing in the presence of the jury until it is terminated by the verdict of the jury.

It is unfortunate that *Khalid Panjang*'s case do not give the facts of the case. Therefore we are in no position to see what transpired in that case which gave rise to the principle referred to. We do not know what the charge was, as in 1963, quite a number of offences were triable with a jury then. We also do not know at what stage of the proceedings the charge was amended and by whom. The charge may well have been amended by the court itself as the last paragraph of the report seems to suggest. Therefore, we are of the view that the broad principle in *Khalid Panjang*'s case cannot be applied to the facts of the present case. It is our view that the facts of the present case are on all fours with the facts in another case referred to by the learned deputy public prosecutor. The circumstances found in *Yau Heng Fang v PP* [1985] 2 MLJ 335 are similar to the present case before us. In that case, as in the present case, the appellant had originally been charged for murder under s 302 of the Penal Code and tried in the High Court before a judge and jury. At the close of the prosecution case, the charge was amended to one of culpable homicide not amounting to murder under s 304 of the Penal Code. Thereupon, the jury was discharged and the trial continued with the judge sitting alone. He was convicted on the reduced charge and sentenced to 10 years' imprisonment. He appealed to the Supreme Court. The principal ground of appeal was that the trial was a nullity on the ground that the appellant, having been given in charge to the jury in accordance with s 200(ii) of the Criminal Procedure Code, the remaining provisions of Ch XII of the Code including the requirement for the jury to return a verdict was never complied with and as such the appellant was not lawfully convicted and sentenced. The appeal was, however, allowed not on the principal ground but on the issue of the identity of the appellant not having been satisfactorily proved and the learned judge's rejection of the defence of alibi. On the principal ground, Mohd Azmi SCJ (as he then was) at p 337 states:

> In practical terms, jury trial is available in this country only where the charge is murder under s 302 Penal Code and where the trial is held in West Malaysia. In the present appeal, the appellant was properly tried before a jury when the charge against him was one for murder. But when the charge was reduced to s 304 at the close of case for prosecution, the offence ceased to carry the death penalty and by virtue of s 200 Criminal Procedure Code the appellant should no longer be tried before jury. The requirement of s 232(i) for the jury to return a verdict 'on all the charges on which the accused is tried' must be read in the context of s 210(ii), ie charges upon which the accused has been arraigned when the registrar gives the accused in charge to the jury, and by virtue of s 200 such charges can only relate to offences punishable with death. It is therefore our judgment that whenever a charge of murder is amended to a lesser charge which does not carry the death sentence, the proper procedure to be adopted is for the trial judge to discharge the jury and proceed to hear the case under Chapter XX of the Criminal Procedure Code. In the circumstances, we are of the view that the learned judge was correct in law in discharging the jury after the charge was amended and in proceeding to hear the case without jury.

Learned counsel further argued that *Khalid Panjang*'s case was never cited in the Supreme Court during the *Yau Heng Fang* appeal. It is our view that in the light of the vagueness of facts in *Khalid Panjang*'s case, it would not have made any impact in the decision of the Supreme Court. In any event, the main thrust of the Supreme Court's decision is that whenever a charge for murder is amended to a lesser charge that does not carry the death sentence, the proper procedure to be adopted is for the trial judge to discharge the jury and proceed to hear the case under Ch XX of the Criminal Procedure Code.

We are of the view that in the circumstances of the present appeal and in the light of the Supreme Court decision in *Yau Heng Fang*, the learned judge had properly discharged the jury when the murder charge was amended to one of culpable homicide not amounting to murder and in proceeding with the trial without jury. We hold that in the circumstances, the trial was not a nullity. It is also to be noted in passing that such a situation will not arise again since Ch XXII of the Criminal Procedure Code pertaining to trials by jury had been abolished by the Criminal Procedure Code (Amendment) Act 1995 (Act A908/95).

We dismissed the appeal on conviction but allowed the appeal on sentence. After hearing submissions on sentence, we reduced the sentence to 12 years to take effect from the date of the arrest.

Appeal dismissed.

Reported by Andrew Christopher Simon